Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

(3)

No. 91-1895

In the Supreme Court of the United States

OCTOBER TERM, 1992

BOARD OF GOVERNORS OF
STATE COLLEGES AND UNIVERSITIES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that a provision in a collective bargaining agreement denying access to the contractual grievance procedure to employees who file charges of age discrimination violates Section 4(d) of the Age Discrimination in Employment Act, 29 U.S.C. 623(d), which makes it unlawful to discriminate against an employee because he "has made a charge" of age discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 957 F.2d 424. The opinions of the district court (Pet. App. 20-64) are reported at 665 F. Supp. 630, 706 F. Supp. 1377, and 735 F. Supp. 888.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1992. The petition for a writ of certiorari was filed on May 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, the Board of Governors of State Colleges and Universities (Board), is the Illinois agency responsible for managing five state universities. Since 1977, the Board has been a party to a series of collective bargaining agreements with the University Professionals of Illinois (Union), the collective bargaining representative for most of the full-time academic employees at those universities. Each of the collective bargaining agreements has contained an article establishing a three-step grievance procedure leading to binding arbitration. Each agreement has also contained a provision relieving the Board of its obligation to process an employee's grievance if the employee "seeks resolution of the matter in any other forum." That provision, as set forth in Article 17.2 of the agreement in effect at the time of the events giving rise to this suit, reads as follows (Pet. App. 3):

> If prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.

The Board stipulated that it understood Article 17.2 to authorize the Board, in its sole discretion, to refuse to entertain or process an employee's grievance if it learns that the employee has also filed a charge or complaint of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission) or a comparable state agency. R. Doc. 139, ¶¶ 23, 29. The Board has not interpreted the provision to require that the "resolution" sought in the other forum involve the same legal theory, the same burdens or standards of proof, or

the same potential relief. On the contrary, the Board has understood that it may invoke the provision whenever a grievant raises in another forum any claim arising from the same basic fact situation. *Id.* ¶ 28.

The Board has invoked Article 17.2 on at least four occasions after learning that a grievant had filed a charge of discrimination. Pet. App. 4-5 & n.2. The application of the provision in Raymond Lewis's case led to this litigation. Lewis, who taught business law at Northeastern Illinois University (UNI), applied for tenure during the 1983-1984 academic year. After UNI's President recommended that the University deny Lewis's application, Lewis filed a grievance alleging that the President's recommendation had been based on an improper interpretation and application of the prescribed evaluation criteria and had been influenced by factors external and irrelevant to the prescribed evaluation process. The Board subsequently accepted the President's recommendation to deny tenure to Lewis. Lewis did not allege age discrimination on his grievance form or at any time during the grievance procedure. Pet. App. 29; R. Doc. 139, ¶¶ 32, 34-37, 39-40.[1]

The processing of Lewis's grievance lasted more than a year. Prior to an arbitration hearing that was scheduled for May 20, 1985, Lewis met several times with EEOC employees and discussed filing an age

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[1] This disparity between the claims raised in the grievance and the claims raised in the charge of discrimination was not unique to Lewis's case. In fact, in none of the other three cases in which the Board invoked Article 17.2 because grievants filed charges alleging discrimination was the grievance based solely on a discrimination claim. To the contrary, each grievance was based primarily on alleged procedural and/or substantive violations of the prescribed tenure evaluation rules. In only one case did the grievance even mention a discrimination claim. R. Doc. 139, ¶¶ 56, 63, 67, and Exhs. 9, 15 & 21.

discrimination charge. R. Doc. 139, ¶ 44. He was reluctant to file a charge because he feared that UNI would invoke Article 17.2 and stop processing his grievance, but he filed an age discrimination charge with the Commission on May 14. Pet. App. 4. UNI did not learn about Lewis's charge until after the arbitration hearing. Upon learning about the charge, the Board invoked Article 17.2 and directed the arbitrator to cease his deliberations and render no decision. *Ibid.* That action prompted the Commission to file this lawsuit.

2. The EEOC alleged that Article 17.2 discriminates on its face against employees who complain about age discrimination, and therefore violates Section 4(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(d). Section 4(d) provides that "[i]t shall be unlawful for an employer to discriminate against any of his employees * * * because such individual * * * has made a charge * * * under this chapter."

The district court issued three opinions. In its first opinion, the court denied the Board's motion to dismiss the EEOC's complaint. The court first noted that "[i]t is undisputed that § 4(d) of the ADEA prohibits an employer from engaging in discrimination against a person who brings an ADEA action" and that this Court's decision in *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 575 (1982), "teaches that an employee may not validly agree, through a collective bargaining agreement, that his employer may discriminate against him on grounds forbidden by federal law." Pet. App. 59-60. The court then concluded that "Article 17.2 is just this sort of agreement" since "[i]t permits the employer to discriminate against employees who bring ADEA actions." *Id.* at 60.

The EEOC then moved for summary judgment, but a different district court judge denied the motion. Although the new judge agreed that Article 17.2 "is

'discriminatory on its face,'" Pet. App. 42 n.9, quoting *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), the court felt constrained to follow a statement in *Rose* v. *Hearst Magazines Division*, 814 F.2d 491 (7th Cir. 1987). In *Rose*, a jury found in a special verdict that an employer had retaliated against an employee but had not acted willfully. *Id.* at 493. The Seventh Circuit held that under the facts of that case the special verdict answers were inconsistent, stating: "If [the employer] acted in good faith, it cannot be logically held to have retaliated." *Ibid.* Based on that statement, the district court in this case, "with some reluctance," agreed with the Board's contention "that good faith is a sufficient affirmative defense to a charge of retaliation." Pet. App. 42-43.

In its third opinion, the district court concluded that "[t]he Board has produced facts which establish that it adopted Article 17.2 in order to avoid inconsistent results and to save the time, money and effort resulting from litigating in two forums simultaneously." Pet. App. 26. The court then granted summary judgment in favor of the Board. *Id.* at 27.

3. The court of appeals reversed. Pet. App. 1-19. It noted that "Section 4(d) explicitly prohibits discrimination against employees who engage in protected activity," such as filing complaints alleging age discrimination. *Id.* at 7. "Notably," the court added, "Congress chose not to enact any affirmative defenses to a charge of retaliation, * * * and did not provide an exception to Section 4(d) when such discrimination would be rational or financially prudent." Pet. App. 8. "If the Board wants to lobby for a benign discrimination exception to Section 4(d)," the court concluded, "its appeal would be appropriately directed to Congress rather than this Court." *Id.* at 8-9.

The court went on to note that this case was not an individual disparate treatment case, but involved the Board's *policy*. Pet. App. 10-11. The court recognized that a number of other courts have held that "[i]n discriminatory policy cases the employer's reasons for adopting the challenged policy are irrelevant to the policy's legality." *Id.* at 11. The court held that "an employer's alleged good faith is irrelevant" in a retaliatory policy case as well as in a discriminatory policy case. *Id.* at 12.

The court of appeals then turned to the challenged contractual provision. "Article 17.2," the court stated, "authorizes the Board to take an adverse employment action (termination of the in-house grievance proceeding) for the sole reason that the employee has engaged in protected activity (filing an ADEA claim)." Pet. App. 12. It therefore violates Section 4(d): "The Board may not deny grievance proceedings on the basis that employees have filed protected ADEA claims." Pet. App. 14.

That conclusion is not affected, the court added, by the Board's argument that it is not required to provide grievance proceedings to its employees at all. If the Board chooses to provide grievance rights, the Court held, those rights "may not be doled out in a discriminatory fashion." Pet. App. 13, quoting *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984). Moreover, while it is true that Article 17.2 allows the Board to cancel grievance proceedings for employees who have filed various sorts of complaints, not just age discrimination claims, the Seventh Circuit considered that fact irrelevant. "Were we to adopt the Board's argument that a policy imposing adverse treatment on all members of a protected class was rendered non-discriminatory by the inclusion of some members outside the protected class," the court explained, "employers could consistently employ discriminatory criteria as long as they were careful

to draw their discriminatory lines broadly enough to include members of a non-protected class." Pet. App. 16.[2]

ARGUMENT

The decision of the court of appeals is correct and further review by this Court is unwarranted.

1. The Board first argues that this Court should grant its petition for a writ of certiorari because the Seventh Circuit's judgment requires employers to provide "duplicative forums" for discrimination disputes. Pet. 6-10. This argument is flawed both factually and legally.

As an initial matter, although the Board asks this Court to address the propriety of "duplicative forums," the contractual forum that the Board withdrew from grievants filing discrimination charges was not duplicative. During the 12-year period covered by the parties' factual stipulations, there were four instances in which the Board learned that a grievant had filed a charge of discrimination. In each of those cases the grievance was based principally if not solely on allegations that the Board had failed to comply in some way with its tenure evaluation regulations. One of the grievants mentioned a discrimination claim as one of several claims in his grievance, but as far as appears from the record, none of the others raised discrimination claims in their grievances at all.

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[2] Judge Manion concurred, "albeit reluctantly," because the court of appeals' decision permits employees "to operate in two forums." Pet. App. 18-19. But since Section 4(d) of the ADEA prohibits discrimination against employees who file age discrimination claims and Article 17.2 provides that an employee who files an age discrimination claim may lose his right to pursue a grievance, Judge Manion concluded that Article 17.2 was contrary to Section 4(d). He added that "any adjustment will have to be statutory, not with the courts." Pet. App. 19.

Thus, in none of these cases were the two forums genuinely "duplicative." The grievance proceedings primarily addressed whether the tenure decisions were consistent with petitioner's regulations, while the administrative proceedings addressed the employees' statutory discrimination claims. Terminating the grievance proceedings upon learning about the existence of the discrimination claims may have saved the Board money, but it did not serve the Board's purported goal of avoiding duplicative proceedings. See Pet. App. 8 & n.5 (the contractual and statutory proceedings here "involve[d] different claims"). Indeed, this distinction between the types of claims that were addressed in the two forums accentuates the retaliatory nature of the challenged policy. Employees who filed charges lost not merely the right to have their statutory discrimination claims addressed in the grievance proceeding; they lost also the right—a right that similarly situated employees of course retain—to have their *contractual* claims addressed in the grievance proceeding.

But even if Article 17.2 were invoked only when the employee's grievance rested principally or solely on the discrimination claim the employee was raising, the provision would still violate Section 4(d). This Court has repeatedly held that an employee's contractual rights under collective bargaining agreements "are distinct from the employee's statutory * * * rights" under laws like the ADEA. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1656 (1991), citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974). In enacting the principal employment discrimination statutes, Congress meant to supplement rather than supplant rights that employees already possessed under the National Labor Relations Act (NLRA). *Alexander*, 415 U.S. at 48-49 & n.9. Employees are therefore free to pursue their contractual rights in the contractual forum

and their statutory rights in the statutory forum. *Id.* at 48-49, 59-60; *Johnson* v. *Palma*, 931 F.2d 203, 208 (2d Cir. 1991). The union is not permitted to waive the employees' individual statutory rights in the collective bargaining process, *Alexander*, 415 U.S. at 51 (Title VII); *Bartman* v. *Allis-Chalmers Corp.*, 799 F.2d 311, 315 (7th Cir. 1986) (ADEA), cert. denied, 479 U.S. 1092 (1987), nor is the employer permitted to "force an employee to elect either collective bargaining or a statutory remedy." *Johnson*, 931 F.2d at 208.

2. The Board next argues that the court of appeals' decision has created "unwarranted tension" between the NLRA and the ADEA because it infringes unduly on the rights of employers and unions to define the scope and application of their contractual grievance and arbitration provisions. Pet. 10-13. To the extent that such "tension" exists, the Seventh Circuit did not create it in March of 1992; Congress created it in 1967 when it enacted the ADEA. This Court has held that "[t]he terms of any collective-bargaining agreement must comply with federal laws that prohibit discrimination." *UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 575 (1982). Thus, it is clear that employers and unions are not free to enter into collective bargaining agreements that violate Section 4(a) of the ADEA—by, for example, granting most employees access to grievance and arbitration procedures but withholding access from employees who are 60 or older. See Pet. 12. All the Seventh Circuit did in this case is clarify that employers and unions are also prohibited from entering into collective bargaining agreements that violate Section 4(d) of the Act.

3. Finally, petitioner argues that review is warranted to resolve a conflict in the circuits. Pet. 14-17. But petitioner does not contend that there is a conflict with respect to whether employers may exclude from grievance

proceedings employees who bring discrimination claims. In fact, there is no conflict—the other courts of appeals to address the issue have agreed with the Seventh Circuit that such a policy violates the ADEA. *Johnson* v. *Palma*, 931 F.2d at 208 (company's policy of terminating grievances of employees who file discrimination complaints "abridges the [employees'] statutory rights"); see *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1089 (5th Cir. 1987) ("[c]learly if [the company] stopped providing [the employee] benefits to which he was otherwise entitled simply because he filed a charge, the company would be guilty of retaliation").[3]

Rather than allege a direct conflict with respect to whether a policy of excluding employees who file discrimination claims from grievance proceedings is

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[3] Petitioner states that "such exclusions [from grievance procedures] have been found lawful in some other jurisdictions — although not in another United States Court of Appeals." Pet. 9, citing three trial court decisions. Of course, review by this Court normally would not be warranted on account of a disagreement between a court of appeals and a trial court. In any event, petitioner's claim that three courts have found such provisions lawful does not survive close scrutiny. In two of those cases the employer's policy does not appear to have been challenged as unlawful at all. *Kumar* v. *Board of Trustees*, 566 F. Supp. 1299, 1301, 1319, 1327 (D. Mass. 1983), rev'd on other grounds, 774 F.2d 1 (1st Cir. 1985), cert. denied, 475 U.S. 1097 (1986); *Gold* v. *Gallaudet College*, 630 F. Supp. 1176, 1183, 1189 (D.D.C. 1986). In the third case, *Board of Higher Education* v. *Professional Staff Congress/CUNY*, 362 N.Y.S.2d 985, 987-989 (Sup. Ct. 1975), an employer's policy was challenged, but the statutory basis for the challenge is not apparent from the court's decision. Thus, although in our view the policy at issue appears to be contrary to Section 704(a) of Title VII, 42 U.S.C. 2000e-3(a), which is similar to Section 4(d) of the ADEA, the court did not address Section 704(a), and it is not clear from the court's opinion whether the statute was called to the court's attention.

contrary to Section 4(d) of the ADEA, petitioner alleges a more general conflict with the Fifth Circuit's decision in *EEOC* v. *J.M. Huber Corp.*, 927 F.2d 1322, reh'g denied, 942 F.2d 930 (1991). At issue in *Huber* was the company's policy of withholding distribution of a terminated employee's pension benefits if the employee challenged the termination and sought reinstatement. The company claimed that it adopted that policy to protect the qualified tax status of its pension plans under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* 927 F.2d at 1324. On the assumption that "the tax qualified status of the benefit plan could be jeopardized by distributing plan benefits to a terminated employee while the validity of the employee's termination is unsettled and a realistic possibility of reinstatement remains," *id.* at 1330, the court of appeals reversed the district court's grant of summary judgment in favor of the EEOC.

While we do not agree with everything the Fifth Circuit had to say in its opinion in *Huber*, that case is very different from this case. The court, in effect, assumed that the distribution of pension plan assets to a former employee who might be reinstated would be contrary to ERISA and would result in disqualification of the employer's pension plans, a drastic result. Thus, the case appeared to present a conflict between two federal statutes—the ADEA and ERISA—one of which required a distribution of pension plan assets while the other allegedly penalized such a distribution. Whether compliance with another federal law excuses a policy that would otherwise violate Section 4(d) of the ADEA is a question that would depend on the specifics of the federal law at issue. But this case presents no such issue, since the policy embodied in Article 17.2 of the collective bargaining agreement is not compelled by any law, federal or otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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